No. 18-6905

IN THE
Supreme Court of the United States

THOMAS T. SZCZERBA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Notwithstanding its opposition to Szczerba's petition for a writ of certiorari, the government's brief in opposition ("BIO") provides—perhaps unwittingly—several arguments in favor of granting the petition.

First, the government argues that the new test set forth in the decision below—which broadens the test set forth in *Groh*[1] for when a court may properly construe a warrant with reference to a supporting affidavit—should be accepted by this Court. BIO 15-17. The government's argument that the two-prong test in *Groh* should be enlarged by the decision below, providing yet another avenue for the government to escape suppression of evidence seized pursuant to unconstitutional warrants, should be addressed by this Court.

Second, while the government's brief does not expressly address the second question presented by the petition, the government maintains that this Court's decision in *Herring*[2] requires courts to engage in an additional culpability determination of the individual executing officers prior to excluding evidence obtained pursuant to a facially deficient warrant—effectively overruling *Groh* and *Leon*.[3] BIO 15. The Courts of Appeals are divided on this issue and require clarification from this Court.

Third, the government reasons that, because this Court denied a petition for a writ of certiorari which presented a similar issue in *Rosa*,[4] this Court should again

[1] *Groh v. Ramirez*, 540 U.S. 551 (2004).
[2] *Herring v. United States*, 555 U.S. 135 (2009).
[3] *United States v. Leon*, 468 U.S. 897 (1984).
[4] *Rosa v. United States*, 565 U.S. 1236 (2012).

decline to address the questions presented by Szczerba's petition. BIO 13. While the facts at issue in *Rosa* differ significantly from those at issue here, that an arguably similar issue has once again made its way to this Court demonstrates that lower courts still require guidance from this Court. This is a basis for granting, not denying, review.

With respect to the first question presented by Szczerba's petition, the government argues there is no circuit split. BIO 19. However, the government reaches this conclusion not by discussing the *law* applied by the Ninth and Tenth Circuits, but by distinguishing the *facts* in those cases. BIO 19-23. Regardless of whether the facts differ from those in the present case, what matters is that the Ninth and Tenth Circuits continue to apply the two-prong test set out in *Groh*, while the Eighth Circuit has formulated a new broader test that the government hopes will spread. The split between the Eighth Circuit and the Ninth and Tenth Circuits on the law is well-defined, concerning, and should be resolved by this Court.

Finally, in his petition, Szczerba cites the Sixth Circuit's decision in *Lazar*[5] for its unambiguous holding that *Herring* does not question this Court's decisions in *Groh* or *Leon* which held that where a warrant is facially deficient, the good faith exception to the exclusionary rule is legally unavailable, without regard to whether the executing officers acted deliberately, recklessly, or with gross negligence. While the government discusses *Lazar* in its response, the government fails to engage with Szczerba's actual argument. BIO 23-24. Instead, the government simply attempts to

[5] *United States v. Lazar*, 604 F.3d 230 (6th Cir. 2010).

distinguish *Lazar* on its facts while declining to acknowledge that the Sixth Circuit's clear pronouncement concerning this Court's decision in *Herring* has created yet another circuit split necessitating this Court's review.

Because the government's response provides this Court with no justifiable reason for denying review and because the petition presents two important questions that were wrongly decided by the Eighth Circuit and on which the Courts of Appeals are divided, this Court should grant Szczerba's petition.

I. The Government's Response Offers No Justification For Denying Review

A. The Government Proposes A New Test Which Expands The Circumstances In Which A Court May Construe A Warrant With Reference To An Affidavit

In *Groh*, this Court explained, "[t]he fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh*, 540 U.S. at 557 (citing *Massachusetts v. Sheppard*, 468 U.S. 981, 988, n.5 (1984)). However, this Court also noted that the Fourth Amendment does not necessarily prohibit a warrant from cross-referencing other documents. *Id*. This Court explained, "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Id.* at 557-58 (citing, *inter alia*, *United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997); *United States v. Williamson*, 1 F.3d 1134, 1136, n.1 (10th Cir. 1993)).

In an attempt to distance itself from this Court's holding in *Groh*, the decision below asserts:

> The issuing judge signed the supporting affidavit, and Nijkamp testified that she brought both the affidavit and the warrant with her to supervise the search of the hotel room and the Mercedes. That the affidavit was signed by the issuing judge and that it accompanied the warrant distinguishes this case from *Groh*.

Pet. App. 12a. While the decision below does not explain the significance attached to the gratuitous signing of the affidavit by the judge, the government takes a crack at doing so: "[e]ven if the warrant ultimately failed the Fourth Amendment's particularity requirement because it did not make that incorporation express, the central purpose of the particularity requirement was functionally satisfied." BIO 16. The government's argument continues: "[b]y signing the warrant affidavit, the state judge gave his written assurance that he had considered the scope of the search in relation to the probable cause and approved the specific request submitted to him." BIO 17. The government cites no law to support its contention.

Rather, the government advocates for a new legal standard where a court may construe a warrant with reference to a supporting affidavit if: (1) the affidavit accompanies the warrant; and (2) the warrant uses appropriate words of incorporation of the affidavit *or* if, instead, the issuing judge signs the affidavit. This significantly expands the standard set out in *Groh*. *See Groh*, 540 U.S. at 557-58.

It is not surprising that the government seeks to expand the instances in which a court may construe a warrant with reference to supporting documents. But to conclude that executing officers may reasonably rely on an entirely unincorporated

affidavit exenterates the Fourth Amendment's protections. If this decision stands, officers will continue obtaining general warrants completely unlimited in scope, conduct searches pursuant to these unconstitutionally broad warrants, and trust that courts will admit the evidence seized so long as the officers claim to have brought with them a completely unincorporated list of items to be seized.

This strikes at the heart of the problem with the decision below and with the government's argument, as there is no indication that the state judge ascribed the same significance to his signature on the affidavit. Without any explanation, the Eighth Circuit attaches meaning to the judge's signature on the affidavit. However, until the decision below, that gesture had no legal significance. Unlike including words of incorporation of an affidavit on a warrant itself to satisfy the Fourth Amendment's particularity mandate, the mere signing of a detached affidavit that is in no way incorporated into the warrant does not provide particularity. Prior to the decision below, an affidavit made part of the warrant itself could satisfy the Fourth Amendment. Now, in the Eighth Circuit, an affidavit that is not made part of the warrant is sufficient so long as a judge's signature appears on it. This takes this Court's prior jurisprudence one giant leap too far.

This Court should review this decision to determine whether the Eighth Circuit's drastically-expanded formulation of the *Groh* test is legally valid.

B. *Herring* Does Not Require An Additional Culpability Determination Once A Court Concludes That A Warrant Is Facially Deficient

Although it does not expressly address the second question presented by Szczerba's petition, the government's brief makes clear that, in its view, evidence

obtained pursuant to a facially deficient warrant is nonetheless admissible under *Herring* so long as law enforcement's conduct was not deliberate, reckless, or grossly negligent. BIO 15 ("the officers' conduct in this case was objectively reasonable and not deliberate or sufficiently culpable to warrant suppression"). With this, the Eighth Circuit agrees. Pet. App. 13a ("Nijkamp's conduct certainly did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter").

What the government and the Eighth Circuit ignore is that, in *Herring*, this Court did *not* encounter a facially deficient warrant—unlike the warrants at issue in *Groh* and *Szczerba*. In *Herring*, the only reason the warrant was invalid was due to a recordkeeping error which had failed to reveal that the warrant had been previously recalled. *See Herring*, 555 U.S. at 137-38. Conversely, in *Groh* and *Szczerba*, a facially deficient warrant was squarely at issue. *See Groh*, 540 U.S. at 565 ("'a warrant may be so facially deficient—*i.e.,* in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' This is such a case") (quoting *Leon,* 468 U.S. at 923).

Because the warrant at issue in *Herring* was facially *valid*, it made sense to conclude that law enforcement could reasonably rely on it so long as their conduct was not deliberate, reckless, or grossly negligent. *See Herring*, 555 U.S. at 144. But the Eighth Circuit and the government seek to expand the holding in *Herring* to situations in which it has no place—to situations involving facially *deficient* warrants. That said, executing a search pursuant to a facially deficient warrant invariably

involves conduct that is either deliberate, reckless, or grossly negligent. *Id.* This is especially true in this case, where the warrant was literally silent as to a single item that could be seized. The deterrent value of excluding evidence obtained pursuant to facially deficient warrants outweighs its costs.

If it is this Court's intention that courts engage in an additional layer of analysis—following a determination that a warrant is facially deficient—concerning the culpability of individual officers, it should expressly say so, as the Courts of Appeals are divided on whether this additional step is necessary. *Compare Lazar*, 604 F.3d at 237-38 (Sixth Circuit: "*Herring* does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants *ab initio*"); *Rosa*, 626 F.3d at 64 (Second Circuit: "[w]hile we may no longer rely on unincorporated, unattached supporting documents to cure a constitutionally defective warrant, those documents are still relevant to our determination of whether the officers acted in good faith, because they contribute to our assessment of the officer' conduct in a particular case"); *United States v. Wright*, 777 F.3d 635, 639 (3d Cir. 2015) ("even if a warrant is facially invalid, an assessment of the officers' culpability and the value of deterrence may counsel against suppression"); *United States v. Szczerba*, 897 F.3d 929, 939 (8th Cir. 2018) (officer's "conduct certainly did not reflect the type of deliberate, reckless, or grossly negligent disregard for the Fourth Amendment that the exclusionary rule can effectively deter"). On this issue, the circuit split is deep.

Allowing the decision below to stand will allow the good faith exception to effectively stamp out the exclusionary rule. *See Davis v. United States*, 564 U.S. 229, 258 (2011) (Breyer, J., dissenting) ("if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule"). This Court should speak to this issue.

C. Denying Review In *Rosa* Supports Granting Review In *Szczerba*

The government contends that because this Court denied a petition for a writ of certiorari in *Rosa*, it should "follow the same course here." BIO 13. This logic is flawed. While the sole question presented in *Rosa* does have some overlap with the first question presented here, the issue there was far from the same.

The first major distinction is that, in *Rosa*, the search warrant identified the place to be searched *and* the things to be seized. *See* U.S. Const. amend. IV. Here, of course, the warrant did not identify a single item to be seized. Specifically, in *Rosa*, the search warrant directed law enforcement to search a residence for the following:

> The property sought to be seized and searched is described as computer equipment, electronic digital storage media included but not limited to floppy diskettes, compact disc, hard drives whether mounted in a computer or otherwise, video or audio tapes, video surveillance systems, video and digital camera systems, printing devices, monitors, firearms and any written and/or printed and/or electronic stored notes or records which would tend to identify criminal conduct and any personal papers or documents which tend to identify the owner, leasee or whomever has custody or control over the premises searched or the items seized.

Rosa, 626 F.3d at 58. In his appeal, Rosa argued:

> because it failed to state with any level of particularity the specific criminal activity alleged or the type of digital evidence to be sought from the electronic items seized, the warrant authorized the officers to conduct an unfettered search of the contents of his numerous electronic devices, any one of which might contain sensitive personal information unrelated to the suspected crimes[.]

Id. at 61. The Second Circuit agreed "that the search warrant in this case lacked the requisite specificity to allow for a tailored search of his electronic media. The warrant was defective in failing to link the items to be searched and seized to the suspected criminal activity[.]" *Id.* at 62.

Significantly, the Second Circuit noted that the case differed from *Groh* because the warrant *did* "list specific items to be seized." *Id.* at 64. However, the Second Circuit simply concluded that the warrant was overbroad as the list failed "to link that evidence to the criminal activity supported by probable cause." *Id.* at 62.

Ultimately, the Second Circuit held that the good faith exception barred application of the exclusionary rule on those unique facts. *Id.* at 64. It reached this conclusion, in part, by referring to an unincorporated warrant application. *Id.* However, the Second Circuit went out of its way to explain that "the defective warrant in this case certainly did not have the glaring deficiencies of the itemless warrant in *Groh*." *Id.* at 66. In the case now pending before this Court, the defective warrant *did* have "the glaring deficiencies of the itemless warrant in *Groh*." *Id.* These significant distinctions between *Rosa* and this case lend no strength to the government's contention that this Court should "follow the same course here." BIO 13.

Even assuming, *arguendo*, that the circumstances in *Rosa* were more similar to those presented by this petition, the argument that this Court should deny review

simply because it denied the petition in *Rosa* is logically unsound. That an arguably analogous question has once again made its way to this Court supports Szczerba's position—not the government's. Until this Court provides clarity on when the good faith exception can be applied to save evidence obtained pursuant to unconstitutional warrants from exclusion, lower courts will continue to apply different tests for curing particularity shortfalls and divergent tests with respect to the relevance, if any, of law enforcement culpability. These are important questions requiring clarification by this Court.

II. The Courts Of Appeals Are Split With Respect To Both Questions

A. First Question Presented

The government asserts, with respect to the first question presented, that no circuit split is revealed by the decision below. BIO 19. In support, the government factually distinguishes the Ninth Circuit's decision in *McGrew* and the Tenth Circuit's decision in *Williamson* from the present case. BIO 19-23. What the government's factual analysis overlooks, however, is that *McGrew* and *Williamson* each articulate that those circuits continue to apply the two-prong test set out by this Court in *Groh* for when a warrant may be construed with reference to supporting documents, and that this test differs from that set forth in the decision below.

In *McGrew*, the Ninth Circuit unequivocally stated, "[t]he well settled law of this circuit states that a 'search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which

incorporate the affidavit therein.'" *McGrew*, 122 F.3d at 849 (quoting *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982); citing *United States v. Van Damme*, 48 F.3d 461, 466 (9th Cir. 1995); *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993); *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986)).

Attempting to distance itself from *McGrew*, the government argues that the warrant issuing judge there had not signed the affidavit. BIO 20. Again, this constitutes an argument by the government that the well-settled law articulated in *Groh* should be expanded to include instances where a judge signs an affidavit. This is an argument in favor of review, not an argument against it. And it does not evidence the lack of a circuit split on this issue.

The government also mistakenly claims that *McGrew* was premised on Ninth Circuit precedent that required officers executing a search warrant to provide incorporated affidavits to the persons whose property is subject to the search. BIO 20-21. Specifically, the government notes that this requirement was overruled by this Court's decision in *United States v. Grubbs*, 547 U.S. 90 (2006). BIO 21 (citing *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 701 (9th Cir. 2009)). The government's argument is misplaced.

In *SDI Future Health, Inc.*, while acknowledging *Grubbs*, the Ninth Circuit unambiguously rearticulated its continued adherence to the well settled law that,

> [w]e consider an affidavit to be part of a warrant, and therefore potentially curative of any defects, "only if (1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search."

SDI Future Health, Inc., 568 F.3d at 699 (quoting *United States v. Kow*, 58 F.3d 423, 429, n.3 (9th Cir. 1995); citing *United States v. Vesikuru*, 314 F.3d 1116, 1120 (9th Cir. 2002)). The split between the Ninth Circuit and the Eighth Circuit is patent.

In *Williamson*, the Tenth Circuit explained,

> We do not consider the contents of the warrant application or its accompanying affidavit because such documents can cure a defective warrant only when *both* of two requirements are met: "'first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference.'"

Williamson, 1 F.3d at 1136, n.1 (quoting *United States v. Leary*, 846 F.2d 592, 603 (10th Cir. 1988); 2 Wayne R. LaFave, Search and Seizure § 4.6(a) at 241 (2d ed. 1987)).

Again, the government distinguishes *Williamson* on its facts, rather than on its statement of the law on this issue in the Tenth Circuit which differs from the law in the Eighth Circuit.

The government then argues that a more recent case—*United States v. Russian*, 848 F.3d 1239 (10th Cir. 2017)—demonstrates that the Tenth Circuit might reach the same conclusion as the Eighth Circuit on the facts present in this case. BIO 22. About this, the government is mistaken.

In *Russian*, the Tenth Circuit did not question the well settled law that, "[b]ecause the Fourth Amendment by its terms 'requires particularity in the warrant, not in the supporting documents,' an application for a warrant which meets the particularity requirement 'does not save the warrant from its facial invalidity.'" *Id.* at 1244 (quoting *Groh*, 540 U.S. at 557).

In *Russian*, the warrant (like the warrant in *Rosa*) identified a place to be searched *and* things to be seized. *See id.* at 1245 (the warrant "authorized a search of Russian's residence and seizure of any cell phones found inside"). The problem with the warrant was that it did not identify two cell phones already in law enforcement's custody and it did not specify what evidence law enforcement was authorized to seize from the phones. *Id.* Unlike the warrant at issue in the present case, the warrant in *Russian* was not entirely silent with respect to what items could be seized. It simply lacked the necessary specificity.

Although the Tenth Circuit ultimately held that the good faith exception to the exclusionary rule did apply on the specific facts present there, it did so only after discussing several factors. *See id.* at 1246-47. It cannot be assumed that the Tenth Circuit would have engaged in this arduous analysis had the warrant there, like here, been entirely silent as to any items to be seized.

Critically, *Russian* does not support the government's assertion that a circuit split is lacking between the Eighth and Tenth Circuits. *Russian* does not demonstrate that the law governing when a warrant may be construed with reference to its supporting documents has changed since the Tenth Circuit's clear declaration in *Williamson*.

B. Second Question Presented

While the government does not confront the second question presented by the petition head-on, it distinguishes the facts of the Sixth Circuit's decision in *Lazar*, while refusing to engage with Szczerba's actual argument. BIO 23-24.

Szczerba cites *Lazar* for its clear articulation of why *Herring* does not impose on courts an additional level of analysis following a determination that a warrant is facially deficient. Specifically, *Lazar* counsels:

> "'[A] warrant may be so facially deficient—*i.e.,* in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' This is such a case." The Supreme Court's recent decision in *Herring* does not question this statement of law.

Lazar, 604 F.3d at 237 (quoting *Groh,* 540 U.S. at 565; *Leon*, 468 U.S. at 923).

Articulating how the facts in *Herring* supported this Court's conclusion that, in certain instances, an inquiry into the culpability of individual officers is necessary prior to application of the exclusionary rule and defining the effect of *Herring* on cases in which a warrant is facially deficient, the Sixth Circuit explained:

> This case does not involve the sort of police error or misconduct present in *Herring*. Like *Groh,* it instead deals with particularization of search warrants and whether they are facially deficient. Despite the government's argument to the contrary, *Herring* does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants *ab initio.*

Id. at 237-38 (footnotes omitted).

Rather than engaging with this argument, the government argues simply, "[n]othing in *Lazar* precludes reliance on the good-faith exception when officers conduct a search within the limits of what they understand to have been authorized by a judge who signed both the warrant and the supporting affidavit enumerating specific items to be seized." BIO 24.

The government's decision to ignore Szczerba's argument and to, instead, double-down on its position that the Eighth Circuit's announcement of a brand-new

test—which modifies and broadens this Court's test set out in *Groh*—is telling. Especially when coupled with the fact that the government cites no law other than *Szczerba* itself in support of its position that this new test should be blessed by this Court.

The balance of the government's opposition goes to the merits of its position that the Eighth Circuit did not err. But in so doing, the government demonstrates both an unwillingness to engage in Szczerba's arguments and a fundamental misunderstanding of the facts: not only was the warrant's facial deficiency unremedied by the unincorporated affidavit, the record makes clear that the executing officers did not refer to the unincorporated affidavit to properly limit the scope of the searches. Pet. 32-33. Where a warrant is facially deficient, a defendant need not demonstrate that law enforcement acted deliberately, recklessly, or with gross negligence. That said, the need for appreciable deterrence on the facts of this case could not be clearer. Rather than utilizing the unincorporated affidavit to limit the scope of the search, the executing officer testified that she instructed the other officers to seize "whatever [she] felt was relevant" and items of "high monetary value"—that was her "criteria." Pet. 33

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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